REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 37 OF 2019

RICHARD OBWOGE NYAMWANGE.....APPELLANT

VERSUSU

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. M. O. Wambani (Mrs.) – CM Nyamira dated and delivered on the 7th day of November 2019 in the original Nyamira Chief Magistrate's Court Criminal Case No. 262 of 2016}

JUDGEMENT

The appellant was charged with two offences namely Robbery with violence contrary to Section 296 (2) of the Penal Code and Gang rape contrary to Section 10 of the Sexual Offences Act which had an alternative charge of committing an indecent act with an adult contrary to Section 10A of the Sexual Offences Act.

He pleaded not guilty to the charge whereupon a trial ensued and the prosecution called five witnesses to prove its case. The accused also testified on oath and maintained his plea of innocence.

After hearing and considering evidence from both sides the trial Magistrate acquitted him on the charge of gang rape and the alternative charge of indecent act with an adult but found him guilty on the charge of robbery with violence and sentenced him to life imprisonment. He was aggrieved by the conviction and sentence in the charge of robbery with violence hence this appeal. The same is premised on the following grounds: -

"1. That I pleaded not guilty and still maintain the same.

2. That my lord the trial magistrate faulted in both law and fact by rushing for judgements without warning herself that I did not complete my offence for there was limited time on defence day.

3. That my lord the trial magistrate faulted in both law and fact to have posed the judgement without realizing the complainant did not mention any name of the attackers on that fateful night.

4. That the trial magistrate failed in both law and fact to have posed the cruel punishment while there was no exhibit before court to link it me with.

5. That my lord the trial magistrate faulted in both law and fact to have convicted me without warning himself that the assorted shop items alleged were never recovered yet they conducted search in my house.

6. That the trial magistrate equally erred in law to have maliciously posed judgements, identification voice recognition was not explained beyond reasonable doubt that it was none but the accused person bearing in mind that it was at night.

7. My lord the trial magistrate did not realize that there was no forensic test (DNA) from investigation officer to connect me with the alleged incident.

8. That the magistrate faulted in law and points to have gone an extra mile to learned that upon the claimed scream that no community people who heard came to record statement to confirm the same.

9. That my lord the learned magistrate never realized that the said complainant only waited her son to come from eldoret to take her to hospital.

10. The trial magistrate failed law to have relied on mere fabrication having no credible substance to support the allegation.

11. That the learned magistrate failed even to realize that the claimed son who took the complainant to the hospital never recorded statement to confirm the same.

12. That the overall effect is that may this appeal be allowed the conviction quashed and the sentence of life imprisonment set aside and set the appellant free forth with."

The appellant preferred to canvass the appeal through written submissions to which Mr. Majale, Learned Senior Prosecution Counsel replied orally. The gist of his appeal is that the conviction went against the weight of evidence; that the evidence adduced was full of inconsistencies and contradiction; that his right to a fair trial was violated as he was not given an opportunity to conclude his defence and that the investigations were shoddy. He maintained that he was innocent of the charge and contended that information which would have informed the trial court to arrive at a fairer sentence like the fact that none of the stolen property was found in his possession; that he responded whenever he was required; that he did not abscond, that he has a good reputation and that he is a married man were not taken into account. He urged this court to quash the conviction, set aside the sentence and set him at liberty.

Mr. Majale opposed the appeal. He urged this court to uphold the sentence and stated that the evidence adduced gave a corroborative and consistent chain of events which placed the appellant at the scene of the robbery. He contended that the complainant positively identified the appellant with the light of a solar lamp that was on during the incident. He also submitted that the appellant was in addition to being identified by the complainant also identified by Pw3 and that the appellant was familiar to the two witnesses as they knew him as a driver and radio repairer. Mr. Majale submitted therefore that as the appellant's face was not masked Pw1 and Pw3 saw him clearly and identified him as one of the attackers. He further submitted that the elements of the offence of robbery with violence were established in that the appellant was in the company of three other persons, that they were armed with offensive weapons which they used to inflict injury upon the complainant and that they in fact stole money and assorted electronics belonging to the complainant during the incident. Counsel contended that the unsworn defence of the appellant was a mere denial and only aided the prosecution's case as he admitted that he was a driver. Mr. Majale refuted the appellant's submission that he was not accorded sufficient time to conclude his defence and submitted that as it was the accused himself who indicated he did not wish to call witnesses and who closed his own case no prejudice was occasioned. Mr. Majale concluded his submissions by stating that the trial court properly analyzed the evidence and that the defence did not offer any rebuttal and this court ought therefore to concur with the findings of the lower court and dismiss this appeal in its entirety.

In reply, the appellant queried why the witnesses did not disclose his name in their first report if indeed they identified him.

This being a first appeal this court is enjoined to analyze and re-evaluate all the evidence adduced in the court below and come to its own conclusion bearing in mind that it did not see or hear the witnesses and hence make provision for that. In **David Njuguna Wairimu v Republic [2010] eKLR** the Court of Appeal observed: -

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

I have considered the grounds of appeal, the submissions by both sides and the evidence in the court below. There is no doubt that a robbery took place on the date, time and place and under the circumstances adverted to by the complainant and her son SN (Pw3) and in my view the only issue for determination is whether the appellant was positively identified as one of the attackers.

The complainant and her son (Pw3) testified that the robbery took place shortly after 9pm when they had just retired to their residence after closing the shop and bar. Pw3 went to his bedroom and left the complainant in the living room. Before Pw3 could retire to sleep he heard the complainant screaming that there were thieves. Both the complainant and Pw3 testified that the lights in the house and the security bulb outside (which lights were powered by solar) were still on and they could therefore see clearly. Pw3 testified that he encountered the appellant outside his mother's room and that it was the appellant that ordered him to sit down and keep quiet. He stated that he got an opportunity to escape when the appellant and another man who was wearing a mask entered his mother's room. Both Pw1 and Pw3 testified that they saw the appellant's face clearly because there was light. They were both in agreement that the appellant was a regular customer at their shop and they had known him for a considerable period of time. Their evidence was very consistent and there was no contradiction whatsoever. The robbery was reported by Pw3 to Ekerenyo Police Station the same night but according to Pw3 the police were slow in acting so by the time they arrived at the scene word had reached the Chief of the area (Pw2) and he had gone to the scene. The Chief (Pw2) corroborated the complainant's evidence that in her first report to him she mentioned to him that she had identified the appellant and this rules out any possibility of his identification being an afterthought and corroborates her evidence that she recognized him. Chief Inspector David Mursoy (Pw4) the investigating officer in the case also told the court that the complainant disclosed to him that the appellant was one of the attackers. It was his evidence that: -

"The accused person before court was alleged to have been one of the robbers. After Pw1 did that she also told me that during the time of the robbery she was able to identify the accused one Richard Obwoge Nyamwange alias Sotik physically, by voice and by recognition."

The accused was armed with a sword and he had not concealed his face. Pw1 told me that she was enabled by the solar light and the robbers torch lights to identify the accused person……."

It is my finding that the mere reason that he was not arrested that night but asked by the Chief to go to the police station the next day is not proof that he did not commit the offence as that is what is expected in a country that respects the rule of law. Neither is the fact that his name

was not recorded in the Occurrence Book dated 26th November 2015 because although the complainant and her son made their report and mentioned him as a suspect they had no control over what was recorded in the Occurrence Book. Evidence that he was identified at the scene on the robbery by the complainant and her son (Pw3) is very strong and his defence could not rebut it. It is also clear from the record that he was afforded adequate time for his defence and the defence was also closed upon him stating that he had said all that he wanted to say. He also elected not to call a witness. I am not persuaded therefore that his right to a fair trial was violated. A case may be proved against an accused even where the stolen property was not found in his possession or despite his fingerprints not being found at the scene of crime. In this case evidence is that he was recognized at the scene of the robbery not just by one but by two witnesses. The sluggish behavior of the police when they received the report from Pw3 does not water down his or his mother's evidence. The complainant had a chance to be taken to hospital by her own son who was to arrive from Eldoret and the fact that she chose her son and not the police to take her is neither here nor there. That son needed not to give evidence as he did not witness the robbery and the issue of where the complainant was treated was not in contest. I am not persuaded that the appellant was framed. To the contrary I find that evidence against him was watertight. The record does not demonstrate any reason for the complainant and her son to lie against the appellant and I am satisfied that the only reason they implicated him is because they recognized him during the robbery. His own admission that the area Chief and Assistant Chief went to his house that very night is corroboration that the complainant and her son revealed that they had recognized him. His further admission that he had just returned to his house and that wet clothes were found in his house makes their evidence even more credible because it was raining when the robbery occurred. The appeal against conviction has no merit. It is dismissed.

Regarding the sentence, it is my finding that nothing gives this court justification to interfere. The trial court considered the appellant's record and plea in mitigation. It could have sentenced him to death but instead it sentenced him to life imprisonment which, given the circumstances of the offence, was a just punishment. In the premises I find no merit in the appeal against sentence and proceed to dismiss the appeal in its entirety. It is so ordered.

Signed, dated and delivered in Kisii Main Prison this 30th day of April 2020.

E. N. MAINA

JUDGE